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IN THE

Supreme Court of the United States

October Term, 1975

No.

SHUMATE & COMPANY, INC., *et al.*,

Petitioners,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and SHEARSON, HAMMILL & COMPANY, INC.,

Respondents.

SHUMATE & COMPANY, INC., *et al.*,

Petitioners,

v.

AMERICAN STOCK EXCHANGE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The Court of Appeals affirmed a directed verdict by the District Court dismissing petitioners' complaints for treble

damages on the ground that petitioners failed to introduce evidence of antitrust injury, as required by Section 4 of the Clayton Act, to raise a jury question. The Court also held that the District Court had not abused its discretion in refusing to allow the cases to proceed as class actions on the ground that independent questions of whether each purported class member suffered injury predominated over common questions and, therefore, that the difficulties likely to be encountered in maintaining the cases as class actions outweighed the benefits.

Despite the total absence of evidence in the record of any injury resulting from either of the two antitrust conspiracies alleged in the complaints, petitioners now claim that defendants' conduct constituted *per se* violations of the antitrust laws and that it was not necessary for petitioners to offer any evidence that they had suffered injury. Even if petitioners' wholly unsupported assertions of *per se* violations be accepted for the sake of argument—and we submit that they should not—petitioners' assertion that plaintiffs in *per se* cases need not prove injury to themselves (as distinguished from injury to competition in general) is manifestly incorrect, and is contrary to the express provisions of Section 4 of the Clayton Act and to the uniform decisions of this Court.

None of the issues presented in the Petition falls within any of the categories specified in Supreme Court Rule 19; none is an appropriate issue for invoking the certiorari power of this Court.

Opinion Below

The opinion of the Court of Appeals (Pet. App. at A-1 to A-19) has been officially reported at 509 F.2d 147 (5th Cir. 1975).

Questions Presented

1. May plaintiffs recover treble damages under Section 4 of the Clayton Act for alleged violations of the antitrust laws where they have failed to introduce any evidence establishing that defendants' alleged conduct caused any injury to themselves? (This question corresponds to petitioners' Question 1.)

2. Did the District Court, as affirmed by the Court of Appeals, abuse its discretion in holding that the independent questions of damage to each individual member of the class predominated over common questions and therefore that the difficulties likely to be encountered in maintaining these cases as class actions outweighed the benefits? (This question corresponds to petitioners' Question 2.)

Statement of the Cases

Petitioners are Shumate & Company, Inc., a Dallas brokerage firm, and Gaston A. Shumate, its President and sole stockholder.* Respondents are the New York Stock Exchange, Inc. ("NYSE"), The American Stock Exchange, Inc. ("AMEX"), the National Association of Securities Dealers, Inc. ("NASD"), and Shearson, Hammill & Company, Inc. The New York and American Stock Exchanges are national securities exchanges registered with the Securities and Exchange Commission pursuant to § 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f. The NASD is a "national securities association" established and regulated pursuant to the Maloney Act (15 U.S.C. § 78o-3) and is primarily engaged in regulatory activities in connection with the over-the-counter ("OTC") market.

* In this brief, petitioners will be referred to collectively as Shumate and individually as Mr. Shumate and Shumate & Company.

Its members include virtually all broker-dealers involved in the general securities business. Shumate & Company is a member of the NASD, but not of either exchange.

The Securities Markets

There are two basic markets for the purchase and sale of securities: the exchange markets and the OTC market. The stock exchanges are central market places where all potential buyers and sellers of securities listed on those exchanges can be brought together, through their brokers, to auction their securities. Extensive information on trading in the exchange markets is available so the public can see the current bid and asked quotations for all listed securities and the actual prices and number of shares involved in trades of those securities during each business day.

In the OTC market, unlike the exchange markets, there is no central market place for trades. Trades take place in the offices of brokers as a result of communication by telephone between them. One segment of the OTC market is called the "third market." It consists of trades off the floors of the exchanges in securities which are listed on the exchanges. Apart from transactions in listed securities currently reflected on the recently introduced composite tape, actual trades in the OTC market generally are not reported to the public; the only information which a prospective purchaser or seller of an unlisted security has available are bid and asked prices quoted by dealers who are "making a market" in the stock in question.

The NASDAQ System

In response to a requirement by an amendment to the Securities Exchange Act of 1934 that the NASD provide rules for dissemination of quotations on securities sold

otherwise than on national securities exchanges, the NASD employed Arthur D. Little, Inc. in 1967 to examine the feasibility of a national automated quotation system for OTC trading. The next year, the NASD hired Bunker-Ramo Corp. to construct the system, which was named the National Association of Securities Dealers Automated Quotations System (NASDAQ). Under the system, a NASDAQ machine, which somewhat resembles a television screen, has been made available, by subscription, to any member of the NASD who is willing to pay for it. The machines are designed to electronically display quotations for OTC securities included in the system. Securities may be included in the system upon application by two or more brokerage firms who are market makers in the stock. Service is available at three levels: Level 1 gives the viewer representative bid and asked quotations in a stock; Level 2 gives the viewer bid and asked quotations of all market makers in the stock; Level 3 allows a broker to enter his own quotes as a market maker.*

Shumate's Claims

In the two cases before the Court on Shumate's petition, Shumate alleges two conspiracies among the defendants: (1) a conspiracy to exclude securities listed on the stock exchanges from the NASDAQ system during the start-up period of the system—from February 8, 1971 until April 5, 1971; and (2) a conspiracy to ignore quotations of listed securities once listed securities were included on NASDAQ beginning on April 5, 1971.**

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* Prior to NASDAQ, quotations for OTC securities were available primarily through a service known as the "National Daily List" or Pink Sheets, a daily periodical which publishes quotes in OTC stocks, and through publication in various financial journals.

** This second conspiracy claim was added by an amendment to the Complaints pleaded only five weeks before trial began in October 1973.

The Alleged Conspiracy to Exclude Listed Stocks

With respect to the asserted conspiracy among the defendants to exclude listed securities from NASDAQ at start-up, the evidence in the record showed the following: although the NASDAQ committee of the NASD voted against the inclusion of listed stocks in NASDAQ, the Board of Governors of the NASD* made an initial decision in June of 1970 to include listed stocks in NASDAQ, despite concern about operational and regulatory problems, because of the Board's feeling that the SEC wanted listed stocks included. In September, Ralph Saul, then President of the Amex, visited Hamer Budge, the Chairman of the SEC, to express his concern as to the impact which inclusion of listed stocks in NASDAQ might have upon the securities markets. The Chairman told Mr. Saul to write a letter outlining his views. Mr. Saul wrote such a letter, opposing the inclusion of listed stocks at the start-up, pending further study of the impact of such a decision on the exchange markets. Within a few days of that letter—and without any consultation with Mr. Saul—Robert Haack, then President of the NYSE, wrote a letter to the SEC, opposing the initial inclusion of listed stocks on grounds somewhat different from those expressed by Mr. Saul. Gordon Macklin, President of the NASD, met with Chairman Budge on October 20, 1970 to express once again the NASD's own concern—as reflected in the decision of the NASDAQ committee—regarding inclusion of listed stocks in NASDAQ. On October 22, Chairman Budge telephoned Macklin and said that the SEC would approve not including listed stocks in NASDAQ at start-up. Accordingly, on the following day, October 23, 1970, the NASD decided to begin

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* The membership of the NASD in November of 1966 authorized the Board of Governors to establish the necessary rules and operating procedures for the system.

operation of NASDAQ without listed stocks, but to continue to study the question of inclusion of listed stocks with a view to resolving the problems which such inclusion might engender.*

NASDAQ began operations on February 8, 1971, with quotations only for nonlisted OTC securities. Eight weeks later, on April 5, 1971, the NASD, on a test basis, included each of the 32 listed stocks which qualified for inclusion in NASDAQ under the NASDAQ requirements for nonlisted securities, including the only two stocks for which Shumate had requested listing.** After expiration of the test period, the NASD, with SEC approval, made all listed stocks eligible for inclusion on NASDAQ. Any listed security is included when, as with an unlisted security, a specified number of market makers has properly requested its inclusion. Thus, any security will be listed on NASDAQ only as a result of the decisions of the requisite number of individual firms to make a market in that security. None of the defendants has any control over those decisions.

In short, it is undisputed that at all times since April 5, 1971, eight weeks after start-up, listed securities have been

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* The decision to begin operation of NASDAQ without listed securities, just as the initial decision in June, 1970 to include listed stocks, was made by the Board of Governors of the NASD, the membership of the NASD having delegated to the Board authority to establish rules and operating procedures for NASDAQ. Accordingly, there was no need for the Board of Governors to request approval by the membership of the decision to begin without listed stocks, especially since the effect of the decision was to delay inclusion of listed securities for only eight weeks.

** Shumate concedes at page 8 of the Petition that the listed securities included in the test were all of the listed securities "for which inclusion [in NASDAQ] had theretofore been requested."

eligible for inclusion in NASDAQ upon the same terms and conditions as nonlisted securities. It is equally undisputed that Shumate & Company, Inc. did not even attempt to obtain a NASDAQ machine until August 1972 and did not actually install such a machine in its office until January 1973—more than 20 months after listed stocks were first included in NASDAQ.

The Alleged Conspiracy to Ignore Listed Stocks

Shumate introduced no evidence of a conspiracy among the defendants to ignore quotations for listed securities once listed securities were included on NASDAQ on April 5, 1971. The proof by which Shumate purported to address this issue was limited essentially to the testimony of a few brokers that the NASDAQ machine is not interrogated by them before making a trade on the exchange floor. There was no testimony, however, to establish that the brokers' conduct was in any way improper, much less that it was part of any conspiracy among these individuals or among the firms by whom they were employed. Most important, there was absolutely no testimony indicating that any of this was by reason of any act of either exchange or the NASD—let alone as a result of a conspiracy among them.*

The Directed Verdict and Affirmance by the Court of Appeals

At the close of plaintiffs' case, the District Court directed a verdict against Shumate with respect to both of

* To the extent Shumate's proof provided any explanation for the fact that certain brokers did not interrogate NASDAQ for quotes on listed stocks before trading on the exchanges, it lay in the testimony that there were at times technical and functional difficulties with the NASDAQ system, and that NASDAQ quotes, good in the best of times for only 100 shares, would disappear from the screen in the face of bad news.

the alleged conspiracies. The District Court found that Shumate had failed to introduce any substantial evidence that it had been injured in "its business or property by reason of anything forbidden in the antitrust laws" within the meaning of Clayton Act § 4, 15 U.S.C. § 15. While the District Court found that "there may be evidence upon which reasonable minds could differ" as to the existence of a conspiracy to exclude listed stocks during the start-up period (although no proof had been offered of any injury from any such conspiracy), the District Court found that Shumate had failed to introduce any evidence to establish the existence of a conspiracy to ignore quotations of listed securities on NASDAQ.

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. The Court of Appeals held that Shumate had totally failed to provide sufficient evidence of injury with respect to either of the two alleged conspiracies.*

Shumate alleged basically four types of injury: (1) an increase in third market trading volume less than Mr. Shumate had anticipated under NASDAQ, (2) lower annual profits resulting from an inability to attract new salespersons, (3) the loss of commissions on orders placed in April and May of 1972 by a retirement fund, and (4) the loss in August 1973 of a discretionary account for which Shumate & Company was paid an annual fee.

With respect to the alleged conspiracy to exclude listed securities from NASDAQ at start-up (the only one on

* The Court of Appeals found it unnecessary to reach the questions of whether Shumate had provided sufficient evidence of either of the two alleged conspiracies to reach the jury on the conspiracy questions. The recitation of the facts of the case by the Court of Appeals makes it apparent, however, that the Court of Appeals believed proof of both alleged conspiracies to be totally lacking. (See Pet. App. at A-2 to A-4).

which the District Court found sufficient evidence of conspiracy to go to the jury), the Court of Appeals rejected Shumate's four alleged items of injury as totally unrelated:

> "None of these elements of injury is related to the ineligibility of listed stocks for the period where such stocks were not generally eligible, February 8, 1971, until October 18, 1971. Shumate did seek to have two listed securities placed on NASDAQ in the spring of 1971, in order to become a market maker in them, and they were included during the test period. But once they were listed, nothing indicates that Shumate attempted to make a market in them using NASDAQ. In fact, Shumate could not have used NASDAQ to become a market maker in those securities as he did not have a NASDAQ terminal in his office until early 1973. It is clear that Shumate presented nothing in the record, not even his own unsupported conclusions, to demonstrate any injury during the period that listed securities were excluded pursuant to the alleged conspiracy. In such a situation with *no* evidence of injury presented, the district court was undoubtedly correct in directing a verdict against Shumate on the first count." (Pet. App. at A-8).

With respect to the alleged conspiracy to ignore quotations of listed securities on NASDAQ, which the District Court dismissed for the additional and independent reason that there was insufficient evidence of conspiracy to present a jury question, the Court of Appeals rejected Shumate's four alleged items of damage as totally unsupported by any relevant data. (Pet. App. at A-8 to A-12).

As to the class action issue, the Court of Appeals held that "the district court was within its discretion in deciding that common issues do not predominate" (Pet. App. at A-13).

Reasons for Denying the Writ

1. The Court of Appeals Acted in Accordance With Decisions of This Court in Requiring Proof of Antitrust Injury to Petitioners.

Stripped of complaints about evidentiary rulings, all of which were rejected by the Court of Appeals and none of which is urged in the Petition as a basis for granting a writ of certiorari, petitioners' argument consists of an assertion, wholly unsupported by the record, that the conduct of defendants with respect to NASDAQ constituted *per se* violations of the Sherman Act and, therefore, according to petitioners, injury to them as a result of defendants' conduct must be presumed and need not be proven. Essentially, and quite understandably, petitioners have abandoned their contention in the courts below that they presented sufficient *evidence* of injury to present a jury question. Instead petitioners now, for the first time in this case, contend that they were not required to introduce any evidence of injury—that they were entitled to recover treble damages under Section 4 of the Clayton Act without introducing any evidence that they were injured by reason of an antitrust violation by defendants.

Petitioners' position is flatly contradicted by the express words of Section 4 of the Clayton Act and by the decisions of this Court and other federal courts. Indeed, petitioners have not cited a single decision of this or any other court, or any authority of any kind, in support of their position.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "*Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws* may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." [Emphasis supplied.]

This Court, as well as other federal courts, has interpreted this section as requiring that an antitrust plaintiff must prove the fact of injury to him as an essential element of his claim for relief. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484, 487 (5th Cir. 1967); *Winckler & Smith Citrus Prods. Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n. 1 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965). This Court stated the rule in the *Zenith* case, *supra* at 126-27:

> "Section 4 of the Clayton Act required that Zenith show an injury to its 'business or property by reason of anything forbidden in the antitrust laws.' If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4."

As *Zenith* and other cases demonstrate, moreover, the requirement that a plaintiff prove injury as a prerequisite to recovery applies with equal force to cases involving *per se* violations of the antitrust laws. In *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, *supra*, for example, this Court, in reversing the dismissal of a complaint which alleged the same type of conduct found to be a *per se* viola-

tion in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959),* made it clear that proof of injury to the plaintiff is an essential element of a private treble damage action:

> "Therefore, to state a claim upon which relief can be granted under that section [Sherman Act § 1], allegations adequate to show a violation and, *in a private treble damage action, that plaintiff was damaged thereby are all the law requires.*" 364 U.S. at 660. [Emphasis supplied.]

Petitioners' argument that they are not required to prove injury to themselves is also contrary to the principle that not only must an antitrust plaintiff prove injury but he must prove injury which was a direct result of the claimed antitrust violation and not merely incidental. As this Court stated in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 14 (1972):

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [Citing decisions in ten Courts of Appeals.]

It is clear, therefore, that the Court of Appeals below acted in conformity with uniform decisions of this Court

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* Petitioners quote from *Klor's* at page 30 of the petition. The issue in *Klor's* to which the quote was addressed by this Court was whether it was necessary for the plaintiff in that case to allege injury to the general public in addition to injury to the plaintiff. This Court held that allegation of public injury was not necessary in *per se* cases. However, it was conceded by the defendants in *Klor's*, upon their motion to dismiss, (359 U.S. at 209) that plaintiff itself had been damaged by defendants' conduct.

in requiring that petitioners prove injury to themselves as an essential element of their claim for relief under Section 4 of the Clayton Act. Petitioners' suggestion at page 18 of the Petition that the questions raised by the Petition have not yet been decided by this Court is soundly rebutted by the cases.

2. The Court of Appeals Correctly Held That Plaintiff Failed to Proffer Proof of Injury.

Petitioners have not asked this Court to review the determinations by the District Court and Court of Appeals below that the evidence offered by petitioners was plainly insufficient to prove injury. Any attempt to seek review of these factual determinations, however, would be unavailing; the factual determinations of the courts below were correct and do not raise any issues of sufficient importance to justify certiorari.

Shumate failed to support any of the four claims of injury with any "relevant data." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Hobart Bros. Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973). First, all four of the claims were totally unrelated to the alleged conspiracy to exclude listed securities from NASDAQ at start-up. With respect to the alleged conspiracy to ignore listed securities on NASDAQ, Shumate's claim of a lesser increase in trading volume in the third market than anticipated under NASDAQ was based upon Mr. Shumate's conclusory statement alone; Shumate introduced neither projections of the volume expected from NASDAQ nor any records of the third market trading of Shumate & Company. Shumate's claim of inability to hire salespersons was never connected by evidence to the alleged con-

spiracy to ignore quotations for listed securities. There was no testimony of any prospective salespersons that they chose not to work for Shumate & Company because of the failure of the third market to develop more fully with the commencement of NASDAQ.

Shumate's claim that the alleged conspiracy to ignore listed securities on NASDAQ caused Shumate & Company to lose commissions because of inability to execute specific orders for the New York State Teachers' Retirement System in April and May 1972 was clearly frivolous. Shumate was not a subscriber to NASDAQ in April or May 1972, Shumate & Company did not attempt to execute any of the orders with the aid of NASDAQ and there was no proof introduced that the securities for which the orders were placed were even on the NASDAQ system. Finally, Shumate introduced no evidence that the loss of a $25,000 annual fee in August of 1973 had anything to do with NASDAQ other than Mr. Shumate's unsupported assertion that one of the proximate reasons for losing the account was the failure of NASDAQ to develop as it should have. No data or testimony relating to the operation of the account and no correspondence or testimony from the client were introduced to support Mr. Shumate's bare allegation.

The decision of the Court of Appeals was clearly correct and neither the legal nor factual conclusions of that Court raise issues calling for review by this Court.

3. The Class Action Decision of the District Court, and the Affirmance by the Court of Appeals, were Correct and do not Present Any Issue for Review by This Court.

The District Court rejected Shumate's request that these actions be allowed to proceed as class actions. In a decision rendered in advance of trial, the District Court

reasoned that individual questions of whether each purported class member suffered injury, questions essential to establishing the liability of defendants with respect to each class member, predominated over common questions and, therefore, that "the difficulties likely to be encountered in the management of this case as a class action outweighed the benefits. . . ." (District Court Class Action Decision, April 26, 1973). The Court of Appeals, correctly concluding that the District Court's decision could be upset only for an abuse of discretion, found no such abuse (Pet. App. at A-13; See *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); 3B J. W. Moore, *Federal Practice* ¶ 23.50 at 23-1104 to -1105 (2d ed. 1974)).

Petitioners' argument for invoking the certiorari power of this Court with respect to the class action determination is based upon their argument, shown to be erroneous in Point 1 of this brief (*supra*, pp. 11-14) that individual plaintiffs need not prove injury to recover treble damages under Section 4 of the Clayton Act in the circumstances of this case. (Question Presented number 2, Petition, pp. 2-3.) Petitioners have pointed to no reason in Supreme Court Rule 19 or anywhere else calling for review by this Court of the exercise of discretion by the District Court and affirmance by the Court of Appeals, and there is none.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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